Supreme Court, U.S.
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No. 02-658

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TECK COMINCO ALASKA INCORPORATED'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Teck Cominco Alaska Incorporated ("Teck Cominco") was a petitioner in the Ninth Circuit below and is a respondent in this case. Teck Cominco is a wholly-owned subsidiary of Teck Cominco American Incorporated, which is wholly owned by Cominco Mining Worldwide Holdings, Ltd., which is wholly owned by Cominco Mining Partnership, a partnership of Teck Cominco Metals, Ltd. and Teck Cominco Nova Scotia, Ltd. Teck Cominco Nova Scotia, Ltd. is wholly owned by Teck Cominco Metals, Ltd., which is wholly owned by Teck Cominco Limited, a publicly held company.

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Pursuant to S. Ct. Rule 12.6, respondent Teck Cominco Alaska Incorporated ("Teck Cominco") respectfully submits this response in support of the State of Alaska's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit below. Teck Cominco operates the Red Dog Mine, the world's largest source of zinc concentrate, in Northwest Alaska on lands owned by the NANA Regional Corporation, a regional Native corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*. Along with petitioner State of

Alaska, Teck Cominco sought review in the Ninth Circuit of the EPA's orders in this case.

The question presented is of national significance and should be resolved by this Court. Under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, no "major emitting facility" may be constructed or modified in any "clean air" area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined as "an emission limitation * * * which *the permitting authority*, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). In Alaska—as in most States—the "permitting authority" under the Act is the State.

Accordingly, when Teck Cominco decided to modify its facilities to increase production at the Red Dog Mine, Teck Cominco sought permission from the State of Alaska, which subsequently issued a permit designating a certain technology—"Low NOx"—as BACT for a new generator that Teck Cominco planned to build, the MG-17 generator. The EPA disagreed with the State's BACT determination for the MG-17 generator, however, and issued a series of enforcement orders blocking its construction unless Teck Cominco used a different technology—SCR—that the EPA considered BACT.

The question presented here—whether it is the States or the federal government that has been delegated the authority to make BACT and similar other permitting decisions under the CAA—affects thousands of regulated entities nationwide. Like Teck Cominco, those entities need to know who has that authority. Under the Ninth Circuit's decision, there is nothing to prevent the EPA from invalidating a State's BACT determination long after a permit has been issued and a company has invested heavily in costly technology. Moreover, until the issue is finally resolved by this Court,

regulated entities will continue to encounter administrative delays and incur unnecessary costs in the permitting process. In this case, for example, Teck Cominco spent more than a year working with the State of Alaska to gain approval of its permit application. As a direct result of the Ninth Circuit's decision, however, Teck Cominco is now engaged in cooperative discussions with the EPA to resolve permitting issues and allow for immediate construction and operation of the MG-17 generator. Congress plainly did not intend such a cumbersome review process. *See* S. Rep. No. 95-127, at 32 (1977). This Court's guidance on the jurisdictional allocation between the States and the federal government under this system of "cooperative federalism" is needed.

CONCLUSION

For the foregoing reasons, and those in the State of Alaska's petition for a writ of certiorari, the petition should be granted and the Ninth Circuit's judgment reversed.

Respectfully submitted,

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